No. 87-920

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,
Appellants,
v.
PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND THE CALIFORNIA REPUBLICAN PARTY IN SUPPORT OF APPELLEES

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MOTION OF THE WASHINGTON LEGAL FOUNDATION AND CALIFORNIA REPUBLICAN PARTY FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The Washington Legal Foundation (WLF) and the California Republican Party hereby move, pursuant to Supreme Court Rule 36, for leave to file the annexed brief *amici curiae* in support of the appellees in the above-

captioned proceeding. Consent to filing this brief was granted by the appellees but denied by appellants, thus necessitating the filing of this motion.

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 200,000 members, contributors, and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. In particular, WLF has appeared as *amicus curiae* in a number of cases dealing with the First Amendment rights of businesses and individuals. *See, e.g., Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980); *Pacific Gas & Electric Company v. The Public Utilities Commission of the State of California*, 106 S.Ct. 903 (1986); *Reagan v. Abourezk*, 108 S.Ct. 252 (1987); and *Boos v. Barry*, 56 U.S.L.W. 4254 (U.S. Mar. 22, 1988).

The California Republican Party is that state's party organization which supports Republican candidates for state and federal office as well as engages in related party activities such as voter registration drives. In the course of engaging in these activities, the California Republican Party and its members have been able to conduct such activities as voter registration drives by expending funds as permitted under California law. Both *amici* believe that if the lower court decision in this case is reversed and the prohibition against paying circulators is upheld, such a ruling could cause other states such as California to restrict the ability of all citizens and associations to fully participate in the electoral and initiative process. Such a result would not be in the public interest regardless of one's political beliefs and outlook.

Accordingly, *amici* wish to participate in this case and to bring to this Court's attention additional arguments as to why the lower court decision should be upheld.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND THE CALIFORNIA REPUBLICAN PARTY IN SUPPORT OF APPELLEES

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set forth in the preceding motion and are adopted herein.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt by reference the Statement of the Case as presented in appellees' brief. Nevertheless, *amici* wish to emphasize certain facts.

Colorado is one of 23 states which allow its citizens to place propositions on the ballot through the initiative process to change existing statutes or to amend the Colorado Constitution. Colo. Const. art. V, § 1; Colo. Rev. Stat. § 1-40-101, et seq. (1980). In order for the initiative to appear on the ballot, the proponents of the measure are required to petition the Secretary of State to put the matter on the ballot. The Secretary is required to place the initiative on the ballot if the number of "petitioners" constitutes 5 percent of the total number of voters who cast votes for all candidates for the office of Secretary of State at the last preceding general election, and if those petitioners are registered voters in Colorado. *Id.*

Under Colorado law, the circulator of the petition must sign an affidavit swearing that the signers of the petition affixed their signatures in his or her presence, and that to the best of the knowledge and belief of the affiant, the signers were registered electors or voters. *Id.*

Colorado also has a law that prohibits any payment to any person, corporation, or association for the circulation of the petition as well as prohibiting any payment to a voter or elector to sign such petition. Colo. Rev. Stat. § 1-40-110. Of the 23 states which allow initiatives, only Colorado and two other states, Washington and Nebraska, prohibit paying circulators. *See* Attachment to Joint Appendix (J.A.). Colorado does not prohibit payment to circulators of petitions to obtain signatures to qualify an individual to be on the ballot as a candidate for elective office. Colo. Rev. Stat. § 1-4-801.

The lower court originally adopted the decision of the district court verbatim and upheld the prohibition against paying circulators stating that the law only restricts "a generalized support for a political thought, much like the contribution of money was regarded in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)]. Thus, when the statute is placed in this perspective, it does not appear constitutionally onerous." *Grant v. Meyer*, 741 F.2d 1210, 1213 (10th Cir. 1984).

The Tenth Circuit granted rehearing en banc and subsequently reversed, ruling *inter alia*, that the payment to circulators was more properly characterized as "expenditures" rather than contributions as the district court had ruled, and hence, the prohibition impermissibly restricted First Amendment rights of expression. *Grant v. Meyer*, 828 F.2d 1446, 1457 (10th Cir. 1987). The Court also ruled that there were less intrusive measures available to serve both the state's asserted interest in preventing circulators from "padding" the petition and the interest in ensuring that a measure has a modicum of base support before being placed on the ballot. The Court did not, however, fully examine the nature of these asserted interests. Judges Barrett and Logan dissented.

SUMMARY OF ARGUMENT

The prohibition under Colorado law against paying individuals to circulate petitions infringes on appellees' First Amendment rights of speech, association, and the right to petition. The governmental interests asserted by Colorado to justify the prohibition—to ensure that there is a modicum of support of the initiative and to preserve the integrity of the initiative process—are not necessarily advanced by the prohibition against paying circulators. In any event, there are other measures more narrowly tailored to preserve these alleged interests. Accordingly, the lower court's decision must be affirmed.

ARGUMENT

I. THE GOVERNMENTAL INTEREST ASSERTED, THAT ONLY THOSE INITIATIVE MEASURES WITH A SIGNIFICANT MODICUM OF SUPPORT REACH THE BALLOT, IS SERVED BY LESS RESTRICTIVE MEASURES THAN BY PROHIBITING PAYMENT TO CIRCULATORS.

The only question presented by the Colorado officials in their brief in this case is whether Colorado law can constitutionally restrict payment to circulators "[i]n the interest of assuring that only initiative measures with significant modicum of support reach the ballot." Appellants' Brief at 2. An implicit corollary to this question is whether the prohibition against payment serves the compelling interest of "protecting the integrity of the process by eliminating the incentive to pad petitions and by removing the appearance of corruption." Appellants' Brief at 7. Obviously, if the petitions are "padded," then the modicum of support deemed necessary is frustrated by the inclusion of fictitious or invalid names on the petition. *Amici* will address this second issue separately below.

The interest asserted by the state, that initiative measures receive a modicum of public support, while legitimate, is nevertheless already served by the requirement that only those initiatives which have garnered the signatures of five percent of the voting electorate can be placed on the ballot. There is nothing inherent in the prohibition against paying circulators that furthers that interest. The only restriction that furthers that interest is that part of the law which prohibits paying a voter to sign the petition who may otherwise not have chosen to do so. Colo. Rev. Stat. § 1-40-110. The payment to circulators, on the other hand, has no logical relationship to the level of support that an initiative may enjoy since in all cases, the requisite number of signatures must be obtained regardless of whether the circulator is paid or

not. Indeed, since additional circulators can be utilized if payments to them were allowed, their corresponding increased exposure to the electorate would generate more support and facilitate the citizens' right to petition.

It should be noted at the outset that even obtaining the requisite number of signatures does not necessarily reflect the intensity of support for the initiative that Colorado claims it needs. Voters may simply sign the petition, even though they may be neutral on the subject matter of the initiative or are not fully informed on the issue, on the grounds that the supporters of the initiative deserve an opportunity to get their issue on the ballot and to present it to the electorate for its collective decision. These electors may simply feel that the initiative is a good "safety valve" to be utilized by the electorate regardless of the issue. Indeed, even an *opponent* of the measure may be inclined to sign the initiative hoping that a forthcoming defeat of the controversial measure at the ballot box would put that particular issue to rest once and for all. Other electors may choose to sign the petition for reasons wholly unrelated to the merits of the proposal.[1] Even the dissenting opinion below recognized that solicitors, whether paid or not, are "likely to use friendship or other appeals irrelevant to the merits to obtain signatures," and that those who sign may not necessarily vote for the measure. 828 F.2d at 1460 (Logan, J., dissenting).

If the state's interest is ensuring that the initiative has a modicum of support, then it would only seem logi-

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[1] At the trial level, appellee Paul Grant testified that he obtained some signatures when he told his solicitee, " 'Please sign, today is my birthday,' and most people said, 'Well, if [you] had said that right away, I would have signed right away. You wouldn't have had to go through most of this [explanation of the initiative measure].' " J.A. at 16. Can the state prohibit the solicitor from asking his solicitees to sign because it is his birthday? Although it was Mr. Grant's birthday, can the state prohibit a solicitor from falsely stating it was his or her birthday?

cal for the state to limit access to the initiative to only those who support the measure or would vote for it. However, since the full debate and public discussion on the merits of an initiative develop only after the measure is placed on the ballot, it is unrealistic to expect that there would be strong support for an initiative at the petition stage. Consequently, the only legitimate yardstick for gauging the general level of public support of an initiative is the percentage of signatures necessary to put the measure on the ballot. If experience indicates that five percent is too low a number, Colorado is free to raise it. But the prohibition against paying circulators does not further that interest. One could plausibly argue that paid solicitors would be more encouraged to develop support for the measure, or that more circulators could be made available to the people.

The State of Colorado, however, has attempted to argue that precisely the opposite is true, that Colorado enjoys a higher success rate of initiatives reaching the ballot vis-a-vis those states where paid circulators are permitted. *See* Appellants' Brief at 19. This counter-intuitive argument is flawed for numerous reasons. In the first place, the fact that Colorado had more initiatives on the ballot over a period of time, or a higher success rate of getting an initiative on the ballot than other states which have allowed paid circulators, tells us nothing. There could be a number of reasons that have nothing to do with the payment to circulators which may explain why Colorado has more initiatives on the ballot than some other states, ranging from the subject matter of the initiative to the fact Colorado has less stringent signature and geographical distribution requirements than some other states which have the initiative process. *See* Brief of Appellants at 19; J.A. 71-73; *see also McCleskey v. Kemp*, 107 S.Ct. 1756 (1987) (numerous variables cause jurors to "vote" for the death penalty in particular cases).

Furthermore, the absolute number of initiatives placed on ballots in various states in a given year *viz.*, only one or two, is too low a number upon which to draw any statistically significant conclusions. Similarly invalid is the dissent's observation below that "[i]nitiatives proposed through volunteer petitioners had a much greater chance of adoption." 828 F.2d at 1460 (Logan, J., dissenting). Not only is the conclusion irrelevant since the asserted state interest is ensuring that measures which *reach* the ballot have a modicum of support, not whether they ultimately pass, but the premise is invalid as well. There are a variety of reasons that may explain why one initiative may pass and another fail that have nothing to do with the funding of circulators.

No one has attempted to isolate or control the numerous variables involved in the initiative process in order to make any meaningful conclusions about the impact on the process of the use of paid or unpaid circulators. *Amici* submit that no statistician could make any such conclusions because the number of events in the data base would be too low. The only evidence on this issue submitted in the district court below was a newsletter that simply reported the raw data of the various initiative drives but which contained no expert statistical analysis of that data to explain or prove why some drives succeed and others fail. *See* 741 F.2d 1210, 1213. Thus, the district court was completely wrong to conclude that the state officials "have *proved* some provocative historical data from Colorado." *Id.* (emphasis added). One does not "prove" anything by presenting raw data.

Accordingly, any conclusion that the showing of a modicum of support for an initiative is served better by volunteers rather than by paid circulators, (a) is unwarranted and unproven, (b) was apparently not a reason articulated by the Colorado legislature when it passed the law in 1941, and (c) is irrelevant to fur-

thering the initiative process because the "safety valve" still remains available for those who cannot afford paid circulators and must rely on volunteers. Indeed, if the state is correct, those proponents having the option of using paid or unpaid circulators would choose unpaid circulators if their initiative has a better chance of getting on the ballot and passed.

If this Court were to uphold Colorado law on the grounds that the prohibition against payments to circulators furthers the governmental interest of ensuring that an initiative has a modicum of support, then the government can limit the ability of citizens and organizations to engage in other types of petition drives. For example, the state could prohibit paying vendors to conduct grassroots campaigns encouraging citizens to sign a petition addressed to their Congressman urging the introduction of legislation on the pretext that such petitions, generated by paid vendors, are not truly indicative of a modicum of support that would come from volunteer efforts.

The "logic" of this position could justify the placing of other obstacles in the path of securing signatures to ensure a stronger support if the signers or solicitors were to overcome those burdens. Could Colorado, for example, restrict the time for soliciting signatures between the hours of midnight and 2 a.m. because experience shows that if circulators and solicitees stayed up that late to get the requisite number of signatures, then surely they must be strongly committed to their cause? While this hypothetical is extreme, the principle is the same with respect to the obstacle of prohibiting all payments to circulators.

If the state's interest is a modicum of support for the initiative, that interest is already served by the requirement of securing a minimum number of signatures. The *strength* of the numerical support is not a valid state interest because it opens the door for the state to inquire into the reasons why a person signed the petition.

II. THE INTEREST IN PRESERVING THE INTEGRITY OF INITIATIVE PROCESS, *I.E.* TO PREVENT CIRCULATORS FROM "PADDING" THE PETITION, CAN BE SERVED BY LESS RESTRICTIVE MEASURES WITHOUT VIOLATING THE FIRST AMENDMENT.

The Colorado officials argue that a second compelling governmental interest is to "protect[] the integrity of the process by eliminating the incentive to pad petitions and by removing the appearance of corruption." Appellants' Brief at 7. The majority opinion below assumed the legitimacy of this concern but correctly noted that there were laws more narrowly tailored to prevent the specific abuses:

> Colorado has existing statutes that make it unlawful to forge a signature on a petition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition. *See* Colo.Rev.Stat. §§ 1-13-106, 1-40-119, 1-40-110 (1980). The statutes also require that conspicuous warnings of criminal offenses be printed on every petition and that circulators attach an affidavit attesting, *inter alia*, to the validity of the petition's signatures. *See* Colo.Rev.Stat. §§ 1-40-106 (1986 cum.supp.); *see also* Colo. Const. art. V, § 1. Finally, the Colorado statutes provide elaborate protest procedures for challenging the sufficiency of signatures on any petition, permitting both an administrative determination and an opportunity for judicial review. *See* Colo.Rev.Stat. §§ 1-40-109 (1986 cum.supp.). Thus the State's "legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition or solicitation" by paid circulators of petitions. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. at 637, 100 S.Ct. at 836.

Id. at 1454. The court also noted that under the teachings of *Buckley v. Valeo* and its progeny, restrictions on

financial expenditures in connection with the exercise of First Amendment rights cannot be totally prohibited. 828 F.2d 1446, 1457.

Even the dissent below found Colorado's integrity argument to be "wholly unconvincing" noting that circulators, whether paid or not, would not likely commit a felony to pad their petitions, and that an "overzealous volunteer would in fact seem more likely to overstate supporting arguments for the proposition than the paid solicitor . . . ." 828 F.2d at 1460, at n.2.[2]

Accordingly, the prohibition against paying circulators is not narrowly tailored to remedy the perceived problem of the possibility of padding the petitions. *See also Boos v. Barry*, 56 U.S.L.W. 4254, 4256 (U.S. Mar. 22, 1988) (congressional enactment of a narrowly tailored law to protect diplomatic facilities located outside of the District of Columbia is evidence that the more broadly worded law prohibiting demonstrations near embassies located within the District of Columbia is overbroad).

Since there are already adequate safeguards to preserve the integrity of the process without the prohibition against paying solicitors, the only remaining interest asserted by Colorado is the avoidance of the "appearance of impropriety." Appellants' Brief at 18. Admittedly, *Buckley* held that although bribery laws existed to prevent actual corruption, the "appearance of corruption" with respect to the giving and receipt of large contributions to candidates and officeholders was a legitimate interest and could justify the contribution limits.

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[2] While it is true that under Colorado law, the affidavit of the circulator stating that the names on the petition were actually signed by the individual is prima facie evidence of their validity, in reality, these petitions are routinely challenged by opponents of the initiative. Consequently, invalid names are deleted from the count necessary to achieve the statutory threshhold of signatures, regardless of whether the circulators were paid or not.

424 U.S. 1, 28 (1976). *Amici* submit, however, that the state's argument is flawed for two reasons. First, there is no corresponding "appearance of corruption" concern in the initiative process. The only possible corruption is the actual "padding" of the names on the petition, but those names can be and are usually checked for their validity. In the campaign contribution context, however, there is no similar check to prevent the candidate from returning a "quid" for a large "quo."

Secondly, and more importantly, the payment to the circulator is not the equivalent of giving a "contribution" to a candidate, but rather is more like a candidate "expending" funds to further his message, which may even entail paying circulators to get the candidate's name on the ballot. This Court held in *Buckley* that while contributions to candidates may be limited, expenditures by candidates may not be. *Amici* agree, therefore, with the lower court's analysis that the proponent of an initiative is not merely expressing a generalized support for the initiative by paying a circulator or engaging in "speech by proxy;" rather, the proponent is more like the candidate expending funds to advocate his particular message, a message whose specific words were chosen by the proponent and embodied in the initiative. 828 F.2d at 1457.

Furthermore, the Supreme Court has repeatedly and emphatically drawn the distinction between the compelling state interest involved in a political campaign and ballot measures by striking down restrictions limiting contributions and expenditures for the latter. For example, in *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California*, 454 U.S. 290 (1981), the Court noted that the limits upheld in *Buckley* were a "narrow exception" to the rule that limits on political activity were contrary to the First Amendment," and that *Buckley* dealt with the influence of large contributions on a candidate and not on ballot

measure activities. *Id.* The Court concluded that "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Id.*

Even assuming arguendo that payments to circulators are more like contributions than expenditures, and assuming that there is a legitimate interest in preventing the "appearance of corruption," the current Colorado law banning *all* payments is *per se* unreasonable and not narrowly tailored to address this concern.

Even in the context of campaign contributions, where Congress can regulate, the individual contribution limit is set at $1,000 per candidate. A complete ban on all contributions to candidates would surely violate the First Amendment.[3] Likewise, a complete ban on all payments to circulators is overbroad. Implicit in the state's argument is the unsupported notion that those who are paid on the basis of the number of signatures secured would "pad," or "appear to pad" their petitions. This concern, however, can be addressed more narrowly by limiting only that particular method of payment, *i.e.*, a payment calculated on the basis of the number of signatures obtained, rather than by prohibiting *all* forms of payment. For example, if a circulator were to be paid a flat rate of five dollars an hour for manning a table outside of a grocery store to solicit signatures, regardless of the number of signatures obtained, the likelihood of corruption or appearance of corruption is nil. Yet Colorado law prohibits both flat rate payments as well as payments based on the number of signatures, even though both methods of payment are used in those states which permit the payment of solicitors. *See* J.A. at 31.

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[3] In addition, the disclosure requirements under the campaign laws also serve to limit the appearance of corruption. Colorado could enact a corresponding disclosure provision, such as requiring paid solicitors to tell their solicitees that they are being paid for their efforts, a less intrusive restriction that would serve the state's alleged interest.

In the final analysis, even the State of Colorado must admit that the alleged governmental interests are not served by the prohibition against payments when they overstate their case by describing the First Amendment rights that can be exercised under the current scheme:

> The statute in no way prohibits interested citizens from spending unlimited amounts of money or from associating at will to express their views. The proponents can buy time on television or radio. They can purchase advertising space in newspapers. *They can hire unlimited numbers of persons as advocates to canvas neighborhoods* or to speak at functions. They can distribute leaflets. *They can approach citizens and ask them if they are registered voters. They can even direct them to the [unpaid] petition circulators.*

Appellants' Brief at 19 (emphasis added).

According to the State of Colorado, a proponent of a measure can hire canvassers and advocates who can (1) "approach citizens and ask them if they are registered voters," (2) presumably can solicit those persons' signatures, and finally (3) "direct them to petition circulators" standing next to them whose only function under state law is to witness face-to-face the signing of the petition. These unpaid circulators would have no problem attesting to the fact that these individuals are registered to vote since they have just heard that information being told to the paid advocate. Under this scenario, the unpaid circulator need not utter a single word but merely silently witness the signing of the petition while the paid advocate does all the talking. If this scenario is possible under Colorado law, then the paid advocate can be paid based upon the success of his advocacy efforts, *i.e.*, the number of signatures appearing on the unpaid circulators petition, without violating Colorado law. Accordingly, all of the governmental interests allegedly served by prohibiting payments to circulators apparently can be circumvented by having paid advocates pitch their

case and then steer the voter to the unpaid, mute circulator. As the Supreme Court noted in *Buckley v. Valeo*, in striking down the limits on independent expenditures, "no substantial societal interest would be served by a loophole-closing provision designed to check corruption" when the law would permit other conduct that circumvents the prohibition. 424 U.S. at 45.

If that is the case, the only reason for not permitting payment to circulators for their time manning registration tables is to simply limit the exercise of the petition process itself, a fundamental First Amendment activity, and to penalize those proponents who cannot afford to take time away from work or family commitments to generate grassroots support for an initiative that they strongly believe in. As this Court has long noted, "the very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). "The Speech and Press Clauses, every bit as much as the Petition Clause, were included in the First Amendment to ensure the growth and preservation of democratic self-governance," and that these clauses are "*interrelated components* of the public's exercise of its sovereign authority." *McDonald v. Smith*, 472 U.S. 479, 489 (1985) (Brennan, J. concurring) (emphasis added).

Thus, the right to petition is interrelated with the right of free speech, and any limits on the exercise of the right to petition necessarily affects free speech rights. But even if the rights could be separated, *amici* contend that the Colorado law impermissibly restricts the conduct component of petitioning. In essence, in order to have a valid petition under Colorado law, a citizen must be presented with a prescribed petition and affix his or her name thereon. At that point in time, the citizen has become one of many petitioners. This discrete conduct constitutes the legal act of petitioning since the petitions are addressed to the Secretary of State commanding that official to place the initiative on the ballot. Accordingly, laws such as Colorado's which limit the opportunity for citizens to have access to the petition document itself, limits the exercise of the right to petition, as well as the right to associate or assemble, even if the state is correct that the free speech component of the petitioning process remains unfettered. Viewed in this perspective, the state has not demonstrated a sufficiently compelling governmental interest for so limiting the right to petition and the interrelated right of association.

If the state can prohibit the payment to individuals to garner citizen support and collect signatures for initiatives in order to preserve the integrity of the initiative process, then similar laws can be enacted to limit the payment to individuals for their time and effort in working on voter registration drives, or for gathering the necessary signatures to place a candidate's name on the ballot. While neither of these latter activities are currently prohibited by Colorado law, *amici* can see no fundamental differences between the state's interest in the integrity of the initiative process to prohibit the "padding" of the petition with fictitious or unqualified names and the registering of an unqualified person to vote.

CONCLUSION

For all the foregoing reasons, *amici* urge this Court to affirm the lower court decision.

Respectfully submitted,

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